

- The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 10, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal  
Date of Filing: November 3, 2004  
Case No.: TIA-0305

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.<sup>1</sup> Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.<sup>2</sup> Subpart E provides that all Subpart D claims will be considered as Subpart E claims.<sup>3</sup> OHA continues to process appeals until the DOL commences Subpart E administration.

#### *B. Procedural Background*

The Worker was employed as a laboratory machinist, machinist, and tool and die maker at the DOE's Rocky Flats Plant and Los Alamos National Laboratory for approximately twelve years, from 1955 to 1967.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, colon cancer and renal failure. The Applicant claimed that the Worker's illnesses were the result of being exposed to toxic substances during his work at DOE sites.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Worker had colon cancer, but stated that there was insufficient evidence to conclude that it was "more likely than not" that the colon cancer was related to toxic exposure at the DOE sites.<sup>4</sup> The Panel stated that the

---

<sup>1</sup> Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

<sup>2</sup> See *id.* § 3675(a).

<sup>3</sup> See *id.* § 3681(g)

<sup>4</sup> Physician Panel Report at 1.

"occupational links [for colon cancer] are weak."<sup>5</sup> The Panel noted that some medical literature supports a link between colon cancer and asbestos exposure, but stated that "as a machinist [the Worker] would have had minimal asbestos exposure."<sup>6</sup> With respect to the renal failure claim, the Panel stated that the record lacked "clinical confirmation or characterization of renal failure, urinary retention, or the disease process underlying them."<sup>7</sup> Rather, the Panel noted that the "only information about [the condition] in the record was the statement that his renal failure was caused by obstruction."<sup>8</sup> Therefore, the Panel concluded that there insufficient evidence to evaluate this claim.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that the Worker did not have risk factors for colon cancer; she states that he was active and did not have a weight problem. The Applicant also states that she worked in one of the same buildings as the Worker and that she experienced health problems soon after her employment at the site.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

At the outset, we note that the Panel stated that there was insufficient evidence to find that it was "more likely than not" that the Worker's colon cancer was related to toxic exposures.<sup>9</sup> This language is of potential concern, since it

---

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 1.

could indicate that the Panel applied a slightly higher causation standard than the "at least as likely as not" standard specified in the Rule. However, when read as a whole, it is clear that the Panel determined that it was less likely than not that the illnesses were related to exposures at DOE. For the colon cancer, the Panel found that an occupational link was weak and that, although some literature supports a link with asbestos exposure, the Applicant's job would have involved minimal exposure. With respect to the renal failure, the Panel found that the records were inadequate to evaluate the claim. Accordingly, the Panel's incorrect wording of the standard was harmless error.

Turning to the Applicant's arguments, we find that they do not indicate Panel error. The Applicant's reference to medical literature discussing an association between colon cancer and asbestos exposure ignores the Panel's finding that the Worker had minimal asbestos exposure. Similarly, the Applicant's reference to her own health problems ignores the finding of minimal asbestos exposure.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0305 be, and hereby is, denied.
- (2) The denial pertains only to this appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 10, 2005